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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM PATRICK OLSEM,

Defendant and Appellant.

C082185

(Super. Ct. No. 13F05616)

Tweakers¹ may not make reliable witnesses or sympathetic defendants to juries, particularly when a corpse is buried 10 feet from a tweaker's backyard. Indeed, methamphetamine is the main character in this murder tale. All of the prosecution's percipient witnesses, the defendant, and Larry Lillard, the decedent, were habitual users, although they also drank alcohol, smoked marijuana, and ingested other drugs as well.

¹ Tweakers is the street name for users of methamphetamine.

Following grueling cross-examination challenging the reliability of the witnesses' accounts that defendant had told them he buried Lillard, who he referred to as "Uncle Larry," in the backyard, that Uncle Larry was "pushing up daisies," that he sold Uncle Larry's motorhome and depleted his bank account, a jury convicted defendant William Patrick Olsem of first degree murder.

On appeal, defendant accuses the prosecutor of using his peremptory challenges to exclude African-American jurors, his lawyer of failing to provide competent representation, and the trial court of instructional error and abusing its discretion by refusing to test for DNA on the vibrator found in the rectum of the corpse and to substitute counsel at his request. None of these contentions has merit. We affirm.

FACTS

The Prosecution's Case

A. The Corpse

Defendant lived in a house in North Highlands adjacent to a field. Amanda Razick told a detective at the Placer County Sheriff's Department that defendant moved Lillard's body from a storage unit and buried him in the yard. Razick, a former roommate of defendant, was angry with him for stealing her boyfriend's truck at gunpoint and for refusing to return her belongings after she moved out. She also hoped to obtain favorable treatment for her incarcerated boyfriend. Officers and cadaver dogs went to defendant's property to search for Lillard's body. Defendant's girlfriend, Ginger Gover, directed the officers to the gravesite. They found a body, wrapped in a blue tarp and two sleeping bags, 10 feet on the other side of a fence on defendant's property. The tarp was covered with lime, a substance used to contain odors.

The forensic pathologist found a zip tie, a blue electrical cord, and a black wire around Lillard's neck. His arms and legs were bound together with duct tape. A bone at the top of the neck was fractured. The pathologist did not observe any stab or gunshot

wounds or any other broken bones. She found a small vibrator in Lillard's rectum. The pathologist concluded Lillard died from ligature strangulation and that his body was in a moderate to advanced stage of decomposition.

After examining fly samples taken from the corpse, an expert in forensic entomology estimated that Lillard's body remained above ground and in daylight for about half a day. He estimated that the body was then buried in the ground for anywhere between 225 and 375 days, which correlated with a burial date between August 2012 and January 2013.

B. Defendant's Admissions, Statements, and Lies

Defendant did not testify at trial but he said a lot before and after the corpse was dug up. The most damaging of all of his statements were his confessions to his roommates, both of whom testified at trial.

Defendant lived with his girlfriend, Gover, and for a short time with Gover's friend Razick. Sometime around Christmas 2012, the three were all high on various substances and defendant began talking about his Uncle Larry. Razick remembered defendant saying he had shot his uncle in the back of the head and buried him near a tree in the yard near his house. Looking out the window, she could see a hump near the tree and fresh grass. On one occasion, Razick heard defendant joke about the grave and Uncle Larry "pushing up daisies" and, on another occasion, defendant, referencing someone who had failed to pay him, stated, "he would be pushing up daisies with Uncle Larry" and that he "could be sitting next to Uncle Larry." Later, after he had stolen her boyfriend's truck, defendant called Razick and told her that he had moved Uncle Larry's body and not to get any ideas about calling the police.

Gover remembered defendant indicating he had strangled Uncle Larry. And, in fact, on a prior occasion, defendant nearly choked her unconscious, and on another, he pulled a gun on her. Razick recalled that defendant said Fred helped him move the body

from a storage unit to the yard and that he put lye in a plastic bag before burying the body. Gover also described another evening when she and defendant had watched an episode of *Breaking Bad*. During a particularly long and gruesome scene in which the main character choked a man and the victim struggled before dying, defendant commented, “evil ones take a long time to die.”

Defendant confessed to Razick and Gover but lied to Michael Lillard² about his Uncle Larry’s whereabouts. Lillard served multiple terms of imprisonment, used and sold illegal drugs, and had difficulty managing his life. When he was able to amass about \$40,000 to \$50,000 from the sale of marijuana, he purchased a nice motorhome and planned to travel. He put Michael’s name on the title in case he was rearrested. Michael put \$25,000 in a safety deposit box he opened for his Uncle Larry. But when Michael did not hear from his uncle for several weeks and he received a traffic ticket because the driver of the motorhome had run a red light, he became concerned and filed a missing person’s report. He contacted defendant, who told him, “Uncle Larry brought some fucking tweaks over to his house, sold the motor home to them for \$5,000 and two pounds of weed,” and that his uncle had gone to the state of Washington and was on the lam. Defendant claimed he was funneling money to Lillard through a prostitute. Defendant repeatedly urged Michael to cancel the missing person’s report he had filed. This was all a lie—Lillard was buried in the yard behind defendant’s house and defendant had already sold Lillard’s motorhome.

Defendant also made several incriminating statements after he was arrested for stealing Razick’s boyfriend’s truck. At Detective Ken Addison’s request, Gover visited

² Defendant has been friends with Michael’s older cousin since Michael was 10 years old. Defendant is two years older than Michael. Michael grew up with defendant and usually refers to him as his “cousin.” Growing up, defendant always protected Michael and Michael felt safe with him. Larry Lillard was Michael’s dad’s oldest brother. We refer to Larry Lillard as Lillard or Uncle Larry, and Michael Lillard as Michael.

with defendant at the jail and informed him that police officers were at his house with dogs digging in the yard. Defendant responded, “So they’re going to add book me probably,” and “I’m gonna be gone huh?” After being told that there were a lot of police officers digging, he stated, “Right in the same place? Oh. Dang. Hm.” He was anxious to get bail before other charges could be filed remarking, “They’re gonna charge me with a bunch of stuff, then I – I won’t be able to get no bail.”

Defendant expressed his concern that Razick would testify against him. In a separate call, he asked Gover, “Why can’t you get word to her [Razick] to tell her not to come testify against me?” He told Gover that “I’m sending the soldiers out there right now, okay? I’m gonna have them go to Bud’s and they’re gonna keep hunting her.” Gover said to him, “I don’t want her [Razick] to go to court, okay?” When Gover finally broke up with defendant, he commented that she had been “their informant the whole time anyway.”

Defendant expressed similar concern about Fred testifying. In a call with his daughter, he implored her to contact Gover about Fred because it was important that “son of a bitch [not] get[] on the stand on me.”

C. Motive

Lillard had money, although it was dwindling toward the end of his life. But he had a fancy and well-kept motorhome and a bank account. Social security checks were automatically deposited every month. The prosecution argued that defendant killed Lillard for financial gain. The circumstantial evidence supports the prosecution’s theory.

Lillard paid over \$18,000 for his motorhome. Less than a year later, defendant sold it to Timothy Masuda for about \$6,000 or \$7,000. Masuda, and his girlfriend, Christi Correa, were also users of methamphetamines. Late one night, two men entered the motorhome and confronted Masuda with a baseball bat. On another occasion,

defendant pulled a gun on Masuda. Neither Masuda nor Correa was willing to make a positive identification of defendant at trial.

Immediately after Michael contacted defendant about his uncle's whereabouts, defendant repossessed the motorhome and returned it to Michael. The motorhome was filled with stolen property and trash. Michael testified, "These people were tweaked. The motor home was a 26-foot motor home, and literally I had to climb from the driver's seat of the motor home, I had to climb over trash, clothes, all kinds of crud just to get to the side door to open the door so we could start getting things out of there." Michael hauled three loads of trash to the dump he excavated from the motorhome.

Defendant was also in possession of Lillard's bank statements, insurance policies, photos, his pocketknife, and his glasses. Defendant and Gover burned the paperwork. Defendant also possessed Lillard's bank card. He gave Razick the PIN number and asked her to withdraw money from the account. Gover also used the card. The statements from Lillard's bank account showed numerous withdrawals and purchases at businesses near defendant's home between September 2012 and January 2013.

The Defense

The defense sought to discredit the prosecution's two star witnesses—Amanda Razick and Ginger Gover. During a carefully crafted cross-examination of the two women, defense counsel painted a portrait of witnesses who were under the influence of methamphetamine and other drugs every single day during the time they lived with defendant. Defense counsel artfully extracted information from each woman that no doubt severely diminished their credibility before the jury.

Gover made a series of stunning revelations. She used methamphetamine nearly every day for 25 years. She ate it, snorted it, slammed it, and smoked it. Granted use immunity by the prosecution, she boldly admitted she transported her drugs with her on the airplane to Sacramento and she consumed methamphetamine before testifying in the

morning and at lunch during the trial. She candidly admitted she had grave difficulty remembering details. She acknowledged she was under the influence while giving statements to the investigating police officers, while testifying at the preliminary hearing, and while testifying at trial. She explained that there were many inconsistencies in her statements and testimony because she was really high.

Razick was a lightweight user by comparison. She too had used methamphetamine daily, but in her case, she gave it up after 10 years. She testified she had been clean for nearly two years before trial. Defense counsel argued that she, like Gover, was an unreliable witness due to her chronic drug use. But in Razick's case, defense counsel emphasized that her basic account of what happened was false. Her testimony that defendant said he had shot Lillard was inconsistent with the pathologist's findings that he had not been shot.

After arguing vigorously that the prosecution's main witnesses were unreliable and their testimony should not be believed, defense counsel urged the jury to acquit defendant because the prosecution had failed to prove beyond a reasonable doubt that defendant perpetrated the murder. The fact he may have known about the location of the body did not, in defense counsel's view, mean that he bound and strangled Lillard. Defendant appeals.

DISCUSSION

I

Batson-Wheeler Error³

The prosecutor excused all three African-Americans on the jury panel. The federal and state Constitutions prohibit a prosecutor from exercising his or her

³ *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

peremptory challenges for discriminatory reasons. (*People v. Scott* (2015) 61 Cal.4th 363, 383.) Defendant accuses the prosecutor of racial animus and urges us to reverse his conviction. The ultimate question whether the prosecutor intended to discriminate is a finding of fact accorded great deference on appeal. (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614.) We must affirm the trial court unless its decision is clearly erroneous. (*People v. Thomas* (2011) 51 Cal.4th 449, 474.)

Defendant carries a heavy burden. As the opponent of the peremptory strike, he retains the burden of persuasion regarding racial motivation and must overcome a presumption that a prosecutor uses peremptory challenges in a constitutional manner. (*People v. Lenix, supra*, 44 Cal.4th at pp. 612-613; *People v. Manibusan* (2013) 58 Cal.4th 40, 76.)

A *Batson-Wheeler* challenge involves a three-step inquiry. Here the first two steps are satisfied: (1) by demonstrating the prosecutor exercised his peremptory challenges to strike all three of the African-Americans on the jury panel, defendant established a prima facie showing of discrimination giving rise to an inference of discriminatory purpose, and (2) the prosecutor offered race-neutral explanations for excusing the black jurors. (*People v. Taylor* (2009) 47 Cal.4th 850, 885-886.) The issue thus before us is the third step—whether the trial court erred in finding the defendant did not prove racial discrimination. We turn to the record, mindful that the prosecutor’s justification may be trivial, arbitrary, or idiosyncratic as long as it is race neutral. (*People v. Lenix, supra*, 44 Cal.4th at pp. 613-614.)

Prospective juror Moore, according to the trial court, looked angry and dismayed, as he reported he had seen defendant’s prison shirt. The prosecutor attempted to ascertain whether Moore blamed him for the defendant’s attire. Moore responded, “I think somebody didn’t do right by him,” and he admitted that it upset him. The court observed that Moore “seemed pretty worked up about it,” and had a “trembling lip and [was] not able to speak over this.” The prospective juror’s overt agitation signaled to the

prosecutor he was either sympathetic to the defendant and/or upset with the sheriff and the prosecutor and unable to distinguish their roles. The intensity of his emotional response provides ample justification for the prosecutor's peremptory challenge.

Like Moore, prospective juror Lockett also observed defendant's prison shirt. Although he did not appear as emotionally charged, the prosecutor concluded that he had passively endorsed what Moore had said. In addition, he admitted that he "wasn't forthcoming" in his responses to the juror questionnaire. Although he had stated in the questionnaire he had not previously served on a jury, he had, and although he had denied knowing someone who had been arrested, he later disclosed he had a friend who had been convicted of embezzlement. The prosecutor expressed the same concern about Lockett as he had with Moore about blaming the prosecutor for allowing the jurors to see the defendant's prison shirt. But, in addition, the prosecutor also explained that he doubted the prospective juror's ability to carefully follow the jury instructions given that the prospective juror had failed to accurately respond to the jury questionnaire. Both reasons are race neutral and provide ample support for the trial court's finding the prosecutor had not exercised his peremptory challenge to excuse Lockett for a discriminatory purpose.

Finally, the prosecutor also exercised a peremptory challenge to excuse prospective juror Kennedy based on his voluntary disclosure he had served on a jury that found a defendant "innocent." The prosecutor thought the prospective juror's use of the term "innocent" reflected a bias or lack of understanding of the law like that of the jurors in the O.J. Simpson case who said they found Simpson "innocent." The trial court intimated that it would not have excused Kennedy on these grounds, but it concluded that the prosecutor's rationale was race neutral. Defendant argues on appeal that any reference to the O.J. Simpson trial was necessarily racially motivated.

We agree with the Attorney General that defendant exaggerates the deleterious effects the trial court's ruling will have on potential jurors. He suggests that jurors will fear that if they vote to acquit they will sacrifice their right to serve as jurors in the future.

And he concludes that the jury pool will be filled with potential jurors who will favor the prosecution since those who have found any defendant not guilty in the past can, under the trial court's rationale, be excused.

Defendant misconstrues the prosecutor's justification. The prosecutor did not exercise the peremptory challenge to strike Kennedy simply because he volunteered the fact he served on a case which reached a favorable result for the defendant. Rather, the prosecutor was concerned that by using the terminology "innocent" rather than "not guilty," the prospective juror misunderstood the crux of his obligation as a juror in a criminal case. The prosecutor feared the juror believed he had the burden to prove the defendant was not innocent, rather than not guilty, an erroneous standard of proof. Thus, in the prosecutor's mind, the juror was not equipped to follow the law. The prosecutor's logic may have been flawed and his judgment may have been poor. That is not for us to decide. But on the dispositive question before us, we cannot say the trial court erred by finding that the reason the prosecutor dismissed the juror was race neutral. Indeed, we "presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. (*People v. Manibusan, supra*, 58 Cal.4th at p. 76.) As a consequence, defendant's *Batson-Wheeler* challenge fails.

II

Ineffective Assistance of Counsel

Despite the mountain of evidence against him including motive, opportunity, confessions, admissions, incriminating statements, lies, a corpse 10 feet from his backyard, possession of the decedent's important papers and personal items, and depletion of the decedent's bank account, defendant blames his lawyer for his conviction claiming he failed to provide constitutionally sufficient representation. To the contrary,

the record discloses able and competent representation. Nevertheless, we must respond to each of defendant's claims of inadequate representation.

A. General Principles

A criminal defendant asserting his or her lawyer failed to deliver what the constitution promises bears the burden of proving the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and that it is reasonably likely the result would have been different if the lawyer's performance was up to par. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674].) While it is tempting to ignore the threshold question whether defense counsel's representation fell below professional norms because defendant cannot surmount the prejudice hurdle whether we view any conceivable missteps individually or collectively, we will briefly address his individual accusations of incompetency. We remind defendant of the well-known rule that “ “[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.’ ” ” ” (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

B. Ginger Gover

Defendant finds it inconceivable that any competent lawyer would fail to object to Gover's testimony given that, by her own admission, she was high on methamphetamine while she testified. Her statements and testimony were riddled with inconsistencies. Defendant argues she would not have been allowed to testify on any one of three grounds—incompetency as a witness, lack of personal knowledge, and his inability to cross-examine her. We disagree.

Drug addicts are allowed to testify. (*People v. Panah* (2005) 35 Cal.4th 395, 478.) The question most often is credibility, not competency. (*Ibid.*) A trial court may

disqualify a witness if: (1) the witness is incapable of expressing himself or herself concerning the matter so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).) As long as “the witness has the capacities to perceive, recall, and narrate, the determination whether he in fact perceived and does recall is left to the trier of fact.” (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1071-1072.) Neither inconsistencies nor memory lapses justify disqualifying a witness. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420.)

Through a long and thorough cross-examination, defendant extracted a treasure trove of admissions from Gover. Tactically, defense counsel may very well have wanted to keep Gover in the case *because* she was so blatantly unreliable. He may have sought to dampen the jury’s enthusiasm for the prosecution’s case when it relied so heavily on such an unrepentant and unabashed addict who, apparently without shame, admitted she transported methamphetamine to Sacramento to enable her to continue to use throughout the trial, admitted she had used every day for 25 years, admitted she lied, admitted she could not remember details, and admitted she told different stories to different interrogators at different times.

But because she was so forthright, the jury also might have found that she was credible at least insofar as her testimony was corroborated by other evidence. After all, she answered every question. Her recollection of the night defendant disclosed he had buried the decedent in the backyard was generally consistent with the account provided by Razick. She demonstrated an ability to understand the truth from a lie and, she candidly admitted, she had lied on several occasions. She knew the difference. She recalled numerous events, many of which were corroborated including: defendant took Razick’s boyfriend’s truck, Michael approached defendant looking for the motorhome, she directed the police officers to the exact location of Lillard’s body, and the sale of the motorhome to Masuda.

We, therefore, reject defendant's supposition the trial court would have granted a defense motion to declare Gover incompetent or to preclude her from testifying because she lacked personal knowledge of the events she purported to describe. Nor do we accept his proposition he was denied his right to confrontation because she was under the influence at the time she testified. As mentioned, Gover answered all the questions posed by the defense. While her memory may have been sketchy, her testimony was coherent. In fact, the investigating police officers could not discern whether she was under the influence or not. Simply put, appellate counsel asks us to find that defense counsel could have no strategic objective in conducting a meticulous and well-planned cross-examination that exposed all the weaknesses and flaws in Gover's testimony. This we cannot and will not do. While the fact she was willing to admit to chronic use of methamphetamine all the way through trial is shocking, we conclude defense counsel's tactical decision does not fall below professional norms of reasonableness.

C. Jail Conversation

On August 26, 2013, defendant was arrested for stealing Razick's boyfriend's truck. The following day, Detective Addison and other police officers began digging for the corpse. Gover had worked as an informant for Addison in the past. Addison suggested that Gover visit defendant in the jail. She complied. There is no evidence she was paid as an informant or reached an agreement with Addison for favorable treatment.

Gover's conversation with defendant was recorded. She informed him the police were digging in his backyard. As reported above, he expressed concern he would face additional charges and might be unable to get bail. But he made no direct admissions of guilt and he denied knowing why the police were digging or what they might find.

Defendant criticizes his lawyer for failing to object to the admission of the jailhouse conversation on either of two grounds. He contends his statement would have been excluded because it was deliberately elicited by the government in the absence of

counsel after judicial proceedings had been initiated against him. (*Massiah v. United States* (1964) 377 U.S. 201, 205-206 [12 L.Ed.2d 246] (*Massiah*).) Or equally probable, he asserts the trial court would have suppressed the statement as a custodial statement following interrogation by a government agent without the recital of the requisite admonition on the defendant's constitutional rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).) While it is exceedingly doubtful defendant would have prevailed on either ground, it is abundantly clear the exclusion of his jailhouse conversation with his girlfriend would not have changed the outcome.

To establish a *Massiah* violation, the defendant must show the government entered an agreement to use an informant as a government agent to deliberately elicit incriminating statements from the defendant. (*People v. Hartsch* (2010) 49 Cal.4th 472, 490-491.) Although Detective Addison had used Gover as an informant in the past, there is no evidence she was hired or used as an informant or agent of the government to elicit an incriminating statement from defendant at the jail. Nor is there any evidence she was offered or received any benefit. Rather, it appears she visited defendant in her capacity as his girlfriend, not as a government agent.

Defendant's *Miranda* argument suffers from the same fatal flaw. Defendant was not summoned to an interrogation by a law enforcement officer, but rather by his girlfriend. In the absence of custodial interrogation by a government official there is no *Miranda* violation. Moreover, he was free to refuse the visit, as he had with Michael, and he was free to hang up the telephone on Gover and discontinue the conversation. Thus, neither the *Massiah* claim nor the *Miranda* claim has a leg to stand on.

More significantly, however, defense counsel retains wide discretion to determine whether motions to exclude evidence would be advantageous to his or her client. Here defendant's tacit admissions were harmless. The hallmarks of his guilt, including more direct admissions of guilt, the body 10 feet from his property line, his possession of Lillard's bank card and motorhome, and his lies to his cousin Michael almost guaranteed

a murder conviction. As a tactical decision, defense counsel could have rationally determined that the benefits of admitting defendant's denials of culpability outweighed the risk of admitting the statement. And beyond the deference we pay to his lawyer's tactical decisions, we conclude the exclusion of the jailhouse statement would not have changed the outcome of the case.

D. Prosecutor's Closing Argument

Next defendant complains his lawyer did not object at two points during the prosecutor's closing argument.

First, he contends the prosecutor improperly vouched for Gover's credibility by his statement to the jury, "I would say that [Gover] didn't perjure herself." As the Attorney General points out, defense counsel did object to this argument and the court properly admonished the jury that lawyers are not permitted to vouch for a witness's credibility. The prosecutor rephrased his argument in response. As a result, any potential harm was cured.

Second, defendant insists his lawyer should have objected to the prosecutor's argument discussing Masuda and Correa's fear of him and Masuda's belief that he was a murderer. An objection was warranted, he argues, because there was no evidence to support the prosecutor's belief. But " '[p]rosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*People v. Shazier* (2014) 60 Cal.4th 109, 127.) A prosecutor could reasonably infer that Masuda and Correa's inability to identify defendant after purchasing a motorhome from him was based on fear and their unwillingness to do so was predicated on their belief he had actually murdered Lillard. Correa had blurted out an identification and then took it back. Altogether, the prosecutor could infer their testimony was incredible and their encounters with defendant scared them to such a degree that they assumed he was guilty as charged. These are

inferences a prosecutor is allowed to urge a jury to draw and, therefore, defense counsel's objection would have been futile.

E. Prior Consistent and Inconsistent Statements

Defendant paints a portrait of a lawyer who sat mute during his trial, allowing the prosecutor free rein to present incompetent witnesses and then vouch for their credibility and to repeatedly introduce hearsay evidence under the guise of prior consistent and inconsistent statements. Specifically, he objects to the prosecutor's pattern of calling law enforcement officials essentially to parrot what Gover, Razick, and Correa had already testified about and defense counsel's failure to object to the inadmissible hearsay. The record belies this characterization. It shows a lawyer who made fruitful motions in limine and thoughtful objections and orchestrated a well-conceived strategy to discredit the lineup of tweekers the prosecution relied on to make its case. We reject his contention that the lawyer's failure to object to consistent and inconsistent statements constitutes ineffective assistance of counsel. His decision represents yet another tactical decision we will not second guess on appeal.

The answers the prosecutor elicited from the law enforcement officers who had interviewed Gover, Razick, and Correa were merely cumulative of the testimony the witnesses already had provided. Therefore, defense counsel risked little by failing to object. Yet he could have reasonably determined that he could use the contents of the interviews for defendant's benefit. And that is precisely what he did. When cross-examining the law enforcement officers who had interviewed the witnesses, defense counsel elicited several pieces of advantageous evidence that would not have otherwise been admissible, including: (1) Gover could not remember where defendant's confession occurred, (2) Gover indicated defendant choked Lillard only after the body was found with ligatures around the neck, (3) Correa was not 100 percent certain of her earlier identification of defendant, and (4) Gover repeatedly admitted lying to law enforcement.

“[C]ompetent counsel may often choose to forgo even a valid objection.” (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) In “the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury’s apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.” (*People v. Frierson* (1991) 53 Cal.3d 730, 749.) Defense counsel’s decision not to object to the consistent and inconsistent statements, whether inadmissible hearsay or not, was a proper tactical decision and one we will not review on appeal.

F. Breaking Bad Video

We address defendant’s argument below that the trial court erred by allowing the prosecution to play a strangulation scene from *Breaking Bad*. His argument that his lawyer contributed to the error is confusing and without merit. His lawyer argued vigorously against its admission during motions in limine. He registered his vehement objection to the admission of evidence he claimed was irrelevant and highly prejudicial. The trial court found otherwise. Thus, there was nothing to be gained by raising the same objection again during trial. His objection was timely and rebuts defendant’s allegation on appeal that he provided ineffective assistance by failing to object.

III

Trial Court Errors

A. Admissibility of Evidence: Breaking Bad Video

Defendant contends the trial court erred by admitting a lengthy video clip of the main character strangling his victim. The trial court summarized the contents of the clip as follows: “[S]o I would characterize this as occurring in a basement where the main character kept a guy for some reason, but he is chained to a pole in the basement, and he’s getting ready, having some kind of compassionate feelings about this guy, and the viewer is led to believe that maybe he’s going to let the guy go. I think the character

makes moves towards the fellow, and then the main character sees that the guy who is bound there, that there's a broken plate, and he anticipates that the guy who is captive has taken a shard from that and will attack him if he's released. And somehow the main character gets behind the fellow, gets a chain around his neck, pulls that chain around his neck, and the back of his neck pressed up against the pipe, and it's a pretty gruesome scene. The man is choked to death." We review the trial court's finding that the video clip was more probative than prejudicial for an abuse of discretion.

Gover testified that she watched an episode of *Breaking Bad* with defendant. After viewing the scene described by the trial court, defendant told Gover that "evil ones take a long time to die." Gover testified that defendant made this statement because the victim in the scene "was struggling for a while" before dying. The court rejected the prosecution's suggestion that defendant's comment constituted an adoptive admission but it found the video material because "it's a statement attributed to the defendant regarding what had been determined to be the mechanism of death in this case, and at the very least conveys to a listener the possibility that the defendant has knowledge of some sort of how a mortal choking would look. So in that case it has a very high probative value." The court acknowledged the potential prejudice to defendant if the jurors equated the way the victim died in the scene with the way Lillard died. The court concluded the probative value far outweighed the risk of prejudice, playing the clip would not consume an undue amount of time, and promised to provide the jurors a limiting instruction.

Before playing the video clip, the court instructed the jury as follows: "Now, here's the danger. In this, I don't know if you all watch the *Breaking Bad* thing, in one of the scenes the main character strangles a guy. The danger, and I kind of fought whether I was going to let the lawyers play this or not, is you should not be thinking that this is the way Mr. Lillard died. Maybe it is. Maybe it is not. It is not evidence of how he died. What it's evidence of is, remember the witness said that after they watched this that

[defendant] said something about, that the way the evil ones die, or the evil ones die hard, or something like that.

“So [the] only reason I’m letting you guys see this tape is to give some meaning to those words that he said to this witness, okay. You understand the danger there? I don’t want you to think you’re seeing a video of how all strangulations occur, or how Mr. Lillard died, or what anybody did to Mr. Lillard.”

After giving this limiting instruction, the video was played for the jury.

As these excerpts demonstrate, the trial court carefully balanced the probative value against the potential prejudice in playing the video clip. It attempted to mitigate any potential prejudice by giving a pointed, explicit limiting instruction. Whether the court may have overstated the probative value of the incendiary scene or undervalued the potential prejudice is not for us to decide. The court’s assessment is within the bounds of reason. It is neither arbitrary nor capricious. Finding no abuse of the court’s wide discretion, we must uphold its finding.

B. DNA Testing

Defendant next argues the trial court abused its discretion by denying his request to obtain DNA testing on the vibrator that was removed from the corpse’s rectum. It is true an indigent defendant is entitled to reasonably necessary ancillary services. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085.) But ancillary services are required only to “the minimum assistance necessary to assure [an indigent defendant] ‘a fair opportunity to present his defense’ and ‘to participate meaningfully in [the] judicial proceeding.’ ” (*Medina v. California* (1992) 505 U.S. 437, 444-445 [120 L.Ed.2d 353].) A trial court’s order is presumed correct and will be reversed only for an abuse of discretion. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-321.)

The record fully supports the trial court’s exercise of discretion. At defendant’s request, the court approved appointment of DNA trial counsel. The Sacramento County

Conflict Criminal Defenders (CCD) denied the DNA counsel's request for DNA testing of the vibrator. Defendant requested the trial court to order the testing. At a hearing on defendant's request, a lawyer from CCD testified the sample was gravely degraded because the corpse had been in the ground for several months. Moreover, the sample would have also been contaminated by skin cells, other internal cells, and liquids from the corpse as well as blood and excrement. He further explained:

“Generally, once the DNA molecules face cellular degradation, bacterial, fungal and insect onslot, and so the DNA [breaks] apart. And our conclusion at CCD what you would expect from any DNA profiling would be that from a deceased that had been dead for four months going to have rigor mortis and deterioration of all the tissues, so on and so forth, blow flies and other insects that would get no DNA, or at the best you could get DNA possibly from the victim himself. But we do not think you'd get any DNA at all, let alone any DNA from the perpetrator.”

Because of the high probability any DNA would have degraded over the many months Lillard remained buried, the CCD denied the request to spend \$3,200 for DNA testing. Defendant's DNA counsel concurred. He too testified that it was very unlikely any testing would be successful. Nevertheless, he recommended testing because there was “a chance” they could find some DNA. The court concluded it “heard nothing that warrants the Court making an order that that investigation be pursued.”

The only support for defendant's request was the DNA counsel's speculative testimony that there was a possibility DNA might be recovered. But that testimony was nothing more than raw speculation. The DNA counsel himself did not believe the testing would reap any results. CCD provided a careful analysis of its decision-making process highlighting all the reasons why the testing would not be successful. Thus, we cannot say the trial court abused its discretion in denying a test that everyone agreed likely would be useless.

C. Instruction on Adoptive Admission

Defendant objects to the adoptive admission instruction the trial court delivered to the jury. But again, he does not pay close enough attention to the record. The court expressly found that defendant's statement regarding the *Breaking Bad* video or the video itself did not constitute an adoptive admission. The instruction, therefore, must have been based on other evidence. The Attorney General marshals several possibilities arising from defendant's jailhouse conversations, any one of which could have constituted an adoptive admission and provided the basis for the instruction.

In defendant's conversation with Gover, she informed him the police were digging in his yard and he did not express any outrage or confusion as to why they would be there or deny that they would find anything. Instead he responded, "I'm gonna be gone huh." Similarly, in his conversation with "Freddie," Freddie told him, "You got murder man. You got a murder." Defendant did not assert his innocence; rather he conceded, "Yeah." And when his daughter suggested the charges did not look good for him, he did not dispute his daughter's outlook or deny the charges. To the contrary, he acknowledged, "I'm gonna be in here probably the rest of my life." We reject defendant's attempt to tether the adoptive admission instruction exclusively to the *Breaking Bad* incident, a characterization the trial court expressly rejected, and conclude that the record supports the instruction as applied to the many other opportunities the defendant had to disclaim accusatory statements and did not.

D. Substitution of Counsel

Defendant's constitutional right to counsel includes the right to retain private counsel. (*People v. Courts* (1985) 37 Cal.3d 784, 789.) Defendant asserts the trial court arbitrarily violated this hallmark of our justice system by denying his request to substitute private counsel for his appointed lawyer on the eve of trial and, again, on the day he was to be sentenced, which was six weeks after the jury returned its verdict. Because the right

to a lawyer of his own choosing must be “ ‘carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case’ ” (*id.* at p. 790), we conclude the trial court did not abuse its discretion by denying belated requests for substitution that would require substantial delay in the proceedings. In other words, the Sixth Amendment is necessarily limited by the countervailing state interest in proceeding with prosecutions in an orderly and expeditious basis. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.)

We examine the circumstances under which defendant’s requests for a substitution of counsel were made. On the first day of trial, appointed counsel obtained a brief continuance for a medical emergency. The emergency required a one-week delay. During that time, another lawyer, at defendant’s request, asked permission to substitute in for appointed counsel who did not object. He explained to the court the substitution would require a three-month delay. Appointed counsel was completely prepared and ready to begin trial and the prosecution had flown in Gover, who by then was living out of state.

The trial court denied defendant’s request. The court explained: “I’m going to deny at this time [defendant’s] request to have Mr. Templeton substitute in. And I’m educated by [*People v. Courts, supra*, 37 Cal.3d 784] where the California Supreme Court indicated that [a] motion to substitute counsel with retained counsel may be denied if it will disrupt the orderly process of justice which is certainly the situation here given that our trial was scheduled to start a week ago; that we have heard and ruled on in limine motions; that we have witnesses who have been brought and are prepared to testify; and that we have a defense attorney who is prepared to go forward.”

Defendant makes a snide, and unfounded, accusation that appointed counsel had all but abandoned him. To the contrary, appointed counsel was fully prepared and ready to proceed to trial. But for the medical emergency, trial would have commenced on

schedule. There is absolutely no evidence that appointed counsel was unfit, unprepared, or uninterested in representing defendant enthusiastically and competently. Thus, this is not a case where counsel's inadequacies favored a substitution of counsel to ensure a criminal defendant his constitutional right to adequate representation.

Given that appointed counsel had ably represented defendant through a long series of in limine motions and was prepared to try the case and that one of the most important witnesses for the prosecution already had traveled to Sacramento to testify, the trial court properly concluded that a three-month delay would thwart the orderly administration of justice. It must be noted that defendant did not attempt to substitute counsel until after the trial had been scheduled to begin. Since the request was late, the delay was substantial, and the justification was weak, the trial court did not abuse its discretion by denying the substitution.

Defendant also tried to substitute counsel six weeks after judgment was entered at the time of sentencing. The new lawyer wanted to investigate to determine whether there were any potential grounds for a new trial. He did not offer any newly discovered evidence, just the hope that he might discover some. In addition, he again expressed the family's desire to conduct DNA testing.

The trial court gave a thorough and reasoned analysis for denying the substitution request. The court explained that the DNA issue had already been thoroughly litigated and the suggestion that new witnesses might be found to divulge new evidence was mere speculation. The court concluded, "So the request boils down to asking the Court to continue this case for what would obviously be an extensive amount of time on the basis of speculation that something might be found that would be material in [defendant's] defense, and the Court will deny that request." We can find no abuse of discretion in denying a motion based on pure speculation and to relitigate an issue that was thoroughly litigated at trial. Defendant was accorded a fair trial and was not entitled to try the case again.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MAURO, J.

DUARTE, J.